



Susan D. Reed
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TESTIMONY

OF

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BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
HONORABLE ED WHITFIELD,
CHAIRMAN

May 17, 2005

MR CHAIRMAN WHITFIELD AND MEMBERS OF THE COMMITTEE:

I am Susan Reed, the Criminal District Attorney of Bexar County, Texas. For a familiar landmark to you, Bexar County includes San Antonio, Texas. I want to thank you for inviting me to testify before the committee. I am accompanied today by Mr. Cliff Herberg who is the head of my White Collar Crime Division and who oversees the type of offenses we are going to talk about.

The subject matter of the hearing today concerns products that claim to prevent detection of certain substances by drug-testing programs. As you can well imagine, the office of the district attorney is very interested in techniques or devices designed to *circumvent court ordered* drug testing.

As background, Bexar County has a population of approximately 1.4 million people.

In March of 2005, 28,073 individuals were on probation. This number includes both felony and misdemeanor probationers. As of April 2005, 13,724 probationers are on probation for a "drug offense". In the category of drug offenses, I included 6,879 probationers who had DUI offenses. Based on these figures, roughly 48.8% of probationers are there due to a drug offense. And of that number, 50.1% are on probation for a DUI offense.

As a little more background, I was a District Court Judge for 12 years before becoming the District Attorney. My ultimate goal in placing someone on probation for a drug offense was to address the addiction that accompanies drug usage. As a District Attorney my goal is to enforce the laws established through the legislature. Drug testing is a valid and important tool in accomplishing this objective.

To determine if a probationer is successfully abstaining from drug use, they must be tested. The last thing you want to do is take someone's word that they are clean and drug free.

In 2004, the following represents the drug testing in our county:

Statistics for time period 2/01/2004 - 2/28/2005

	Total	Positive	% Positive
Defendants Tested	21,520	6,544	30.4
Specimens Collected	70,501	11,367	16.1
Tests Performed	250,135	13,009	5.2

Cost estimate of Lab operations including salaries and supplies for FY 2005
\$426,576.00

Please allow me to explain these statistics. There are more tests than defendants because multiple tests will be done on one sample to isolate different types of drugs. There are more specimens than defendants because some defendants are required to test more than once.

The first step in drug testing is collection. Testing is then performed on the collected urine sample. The tester tries to authenticate the collection by personally observing the probationer as they provide the urine specimen. Physical observation of the probationer is an absolute necessity. Otherwise, probationers could simply pour drug free urine into the sample cup and avoid detection. This "physical observation" requirement has caused some probationers to go to great lengths to try to outsmart probation departments.

I believe the reason that I was invited to appear and testify arises from two prosecutions my office handled and I directed in the summer of 2002.

A probationer, after reporting to his supervising officer, was taken into custody for a prior probation violation. Thereafter he was searched for weapons. What was found was not a gun, but a Whizzanator. You can probably guess from the name what the device was designed to do. A Whizzanator is designed to fool the person observing the drug test. It is designed like a jock strap but with a realistic looking phallic device attached. Also included in the \$150 package is synthetic urine and a heat pack, which is used to make the synthetic urine feel as though it has just left the probationer's body.

Upon encountering the Whizzinator in this first instance, our probation department alerted its entire staff to be on the lookout for its use. Within two weeks, a second probationer was caught trying to use the device to fool the drug testing procedures.

Texas has a statute designed to prohibit and penalize this type of activity:

Texas Health & Safety Code § 481.133 entitled: Offense: Falsification of Drug Test Results states:

(a) A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use any substance or device designed to falsify drug test results.

(b) A person commits an offense if the person knowingly or intentionally delivers, possesses with intent to deliver, or manufactures with intent to deliver a substance or device designed to falsify drug test results.

(c) In this section, "drug test" means a lawfully administered test designed to detect the presence of a controlled substance or marihuana.

(d) An offense under Subsection (a) is a Class B misdemeanor.

(e) An offense under Subsection (b) is a Class A misdemeanor.

Today in Texas, a Class A misdemeanor is punishable under Texas Penal Code § 12.21 which states:

An individual adjudged guilty of a Class A misdemeanor shall be punished by:

- (1) a fine not to exceed \$ 4,000;
- (2) confinement in jail for a term not to exceed one year; or
- (3) both such fine and confinement.

A Class B misdemeanor is punishable under Texas Penal Code § 12.22 which states:

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

- (1) a fine not to exceed \$ 2,000;
- (2) confinement in jail for a term not to exceed 180 days; or
- (3) both such fine and confinement.

The two men found to have purchased these devices were each charged and convicted of the possessing these devices with the intent to falsify drug test results. They received the maximum sentences of 180 days in jail and \$2000 fine.

Where does one get this device? It is sold on the Internet through a business called Puck Technology. Our investigation showed it was, at the time, located in Signal Hill, California. Of course the site carries the disclaimer the device be used in accordance with all “Federal, State and Local Laws.” But, from the “Testimonials” on its website, it is clear that Puck Technology and everyone else knows that the devices are being used to defeat drug testing.

Puck Technology and its Whizzinator are still going strong. A casual search on the Internet reveals that in 2003, after our cases in Bexar County, officials in Lubbock County, Texas encountered at least five instances of probationers attempting to use the Whizzinator. In February of this year, actor Tom Sizemore was caught trying to use the device while he was on probation for drug use.

Fortunately, Texas is one of the few states that have made it against the law to possess such a device. Other states, such as New Jersey and Pennsylvania have also passed laws to address the problem. However, to really deal with the issue, the person shelling out the money to buy it shouldn't be the only one dealt a penalty. The individual or company that makes a profit working to defeat drug laws and our national drug policy should be held accountable for its actions. And, be aware, there are many businesses besides Puck Technology that are doing this. Businesses with websites such as Passyourdrugtest.com and pretestedurine.com sell numerous products and devices to circumvent drug tests. Each of these businesses profits from their wrong.

Unfortunately, under existing state laws it is very difficult to prosecute out of state manufacturers and sellers of these devices. Each of them asserts that the products are only for legitimate purposes. They are not manufactured or distributed in the local jurisdiction. Resources are not available to travel between states to investigate the businesses and their operators. As a practical matter, the businesses can claim that they did not manufacture or distribute the device in our jurisdiction. They merely mailed it upon the request of a customer and are “shocked” to learn it was used illegally. While common sense tells us this is false and ridiculous, prosecutors must prove the case to a jury beyond a reasonable doubt. Proof beyond a reasonable doubt requires that we have evidence to defeat these claims.

Local law enforcement would greatly benefit from federal legislation. Congress can act to make the interstate sale and distribution of these devices illegal. Congress can make it a crime to use the mail to ship such devices or use the wires to sell and distribute these devices. And, Congress could also enact legislation providing concurrent jurisdiction to both federal and state prosecutors to enforce the law. This will give local law enforcement, with the assistance of federal law enforcement agencies such as the FBI and DEA who have regional offices across the country, both the law and the practical ability to investigate and prosecute these offenders. With comprehensive federal legislation and the use of federal investigative manpower, local law enforcement can act to protect the integrity of the drug testing process, enforce its own laws and probation policies, and protect the public interest.

In closing, I wish to thank you for the opportunity to testify before you today and to share my experiences.

I will be glad to answer any questions you may have.

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